Table of Contents.

Statement of the case 1

Argument 5

I. There is no conflict between the decision below and previous decisions of this court 5

II. The petitioners were not engaged in purely off-duty private conduct 6

III. The decision below rests on independent state grounds because the police commissioner has broad powers pursuant to Massachusetts St. 1962, c. 322, to control and administer his department 8

Conclusion 9

Table of Authorities Cited.

Cases.

Davenport v. Board of Fire and Police Commissioners of Peoria, 2 Ill. App. 3d 864; 278 N.E. 2d 212, 216 (1972) 8

Eisenstadt v. Baird, 405 U.S. 438; 92 S. Ct. 1029; 31 L. Ed. 2d 349 (1972) 6

Gardner v. Broderick, 392 U.S. 273; 88 S. Ct. 1913; 20 L. Ed. 2d 1082 (1968) 5

Garrity v. New Jersey, 385 U.S. 493; 87 S. Ct. 616; 17 L. Ed. 2d 562 (1967) 6

Griswold v. Connecticut, 381 U.S. 479;
85 S. Ct. 1678; 14 L. Ed. 2d 510 (1965) 6

Roe v. Wade, 410 U.S. 113; 93 S. Ct. 705;
35 L. Ed. 2d 147 (1973) 6

Seattle Police Officers Guild v. City of Seattle,
80 Wash. 2d 307; 494 P. 2d 485 (1972) 8

Stanley v. Georgia, 394 U.S. 557;
89 S. Ct. 1243; 22 L. Ed. 2d 542 (1969) 6

STATUTE.

Massachusetts St. 1962, c. 322 8

Supreme Court of the United States.

October Term, 1975.

No. 75 - 340.

CHESTER BRODERICK et al.,
Petitioners,
v.
ROBERT J. DiGRAZIA,
Respondent.

ON A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

Brief for the Respondent in Opposition to Petition for Writ of Certiorari.

Statement of the Case.

The exhibits, testimony, and admissions in the pleadings indicate the following facts. During the weekend of May 10, 1974, there was scheduled to be held at Newport, Rhode Island, a Law Day celebration. The main event of that celebration was a parade, which was to include marching contingents of uniformed members of several police departments. Arrangements for the celebration were

made by members of the Newport, Rhode Island, police department. Members of the Newport police department invited a contingent of the Boston police department to attend the celebration and to march in the parade in the uniform of the Boston police department. In addition, a member of the Newport police department requested that four Boston police department motorcycles be allowed to participate in the parade. Arrangements for the Boston police department contingent were made by, and through, the Boston Police Patrolmen's Association, which is the exclusive bargaining agent for the patrolmen of the Boston police department.

The request for the use of the Boston police motorcycles was communicated to petitioner Broderick, who is the chairman of the Boston Police Patrolmen's Association. Arrangements were also made to secure a bond to protect the interests of the Boston police department in the motorcycles. Petitioner Broderick spoke with the respondent Boston police commissioner, who ultimately granted permission for the motorcycles to attend. Coordination for the transportation of the Boston police officers and the motorcycles was made between the members of the Newport police department and officials of the Boston Police Patrolmen's Association. Most of the Boston police officers who were to participate in the parade left in two buses which left Boston in the late afternoon of Friday, May 10, 1974.

Arrangements had been made for the Boston police contingent to arrive on Friday evening at the Ramada Inn (hereinafter "the Inn") in Portsmouth, Rhode Island. The manager of the Ramada Inn is Mr. Peter Stilphen. The buses arrived at the Inn in the early evening of May 10, 1974. In addition to the Boston police contingent, the Inn also housed New York and Rhode Island police

contingents and numerous non-police guests. The Boston police contingent had been assigned rooms located in the same immediate area on the second floor of the Inn.

The Boston police contingent remained at the Inn on the evening of May 10, 1974. The parade was scheduled for Saturday, May 11, 1974. That Saturday morning, the individual members of the contingent checked out of the Inn and traveled, mostly by bus, to Newport. At the time of checkout, they were wearing the uniform of the Boston police department. While marching in the parade, the Boston police contingent displayed the Boston police department flag, the city of Boston flag, the Commonwealth of Massachusetts flag, and the banner of the Boston Police Patrolmen's Association. The contingent was accompanied during the parade by four motorcycles. These motorcycles were clearly marked as Boston police motorcycles.

Deputy Superintendent John Barry, commander of the internal affairs division, received numerous correspondence complaining about the actions of the Boston police officers who participated in the Law Day celebration. This correspondence related to the police officers' activities while at the parade, the conduct of the police officers who were controlling the motorcycles, and the conduct of the members of the contingent at the Inn. Mr. Peter Stilphen, the owner of the Inn, submitted an affidavit to the internal affairs division in which he stated that members of the Boston police had been disruptive, abusive, and disorderly while at the Inn. Mr. Stilphen also stated that a Boston police officer had punched one of the other customers and that another Boston police officer had "grabbed" one of the waitresses. During that evening, Mr. Stilphen stated that he had to call the Portsmouth police department twice for assistance, and that, ultimately, the Rhode Island state

police arrived to render assistance. In addition to their open public drunkenness and the verbal abuse, Mr. Stilphen stated, the Boston police officers had left without paying for food, had set off firecrackers in the Inn, had damaged some of the equipment of the Inn, and had exposed themselves in the view of women. Mr. Stilphen also stated that the liquor storage cabinet had been broken into, that the Portsmouth police were notified, and that the Rhode Island state police had investigated the break-in. During the course of the evening, the hotel employees and the other guests were made aware that the large group at the Inn were Boston police officers.

After receipt of the Stilphen complaint and other correspondence, the internal affairs division of the Boston police department proceeded to conduct an investigation to determine whether any Boston police officer had performed any misconduct which would be violative of the terms and conditions of his employment. The investigation included interviewing witnesses in Rhode Island and the examination of numerous records. As a result, the internal affairs division was able to determine the names of many of the Boston police officers who participated in the Newport festivities. One purpose of the investigation was to determine whether some police officers were actually on duty while at Newport, or whether some had falsely called in sick in order to attend the ceremonies. It was then determined that the investigation could proceed only if the police officers involved in the Newport activities were ordered to submit a report as to their activities while there. As a result, a directive went out to each of the commanding officers of all the Boston police officers who were then known to have participated in the Newport activities. This directive also enclosed a guide for completing the report, with fifteen separate points which were

to be covered by the reports. In addition, each of the officers was to be given "immunity" with respect to their reports, and was to be told that nothing contained in the reports would be used in any criminal proceedings.

Argument.

I. There Is No Conflict between the Decision Below and Previous Decisions of This Court.

The decision of the Supreme Judicial Court upheld an order of police administrators that patrolmen submit information. That decision does not conflict with the decision in *Gardner* v. *Broderick,* 392 U.S. 273; 88 S. Ct. 1913; 20 L. Ed. 2d 1082 (1968). In *Gardner,* this Court ruled that a policeman could not be discharged for failure to waive his Fifth Amendment rights. However, the Court stated that:

> "If . . . a policeman . . . had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties [footnote omitted], without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself . . . the privilege against self-incrimination would not have been a bar to his dismissal." 392 U.S. at 278.

In this case, there was no attempt to obtain a waiver of any of the petitioner's Fifth Amendment rights. In fact, the directions for submitting the reports specifically state that "anything the officer relates . . . cannot be used in evidence in a criminal court." Petition for a Writ of Certiorari, p. 29.

The decision below does not conflict with *Garrity* v. *New Jersey*, 385 U.S. 493; 87 S. Ct. 616; 17 L. Ed. 2d 562 (1967). In *Garrity*, this Court held that when a superior officer orders a policeman, under threat of discharge, to submit a statement, that statement may not be introduced in a *criminal* trial. In this case, there are no criminal proceedings, and, in fact, any statement given by the petitioners will not be used in any such proceeding.

The decision below does not conflict with decisions of this Court articulating a right of privacy. *Roe* v. *Wade*, 410 U.S. 113; 93 S. Ct. 705; 35 L. Ed. 2d 147 (1973). *Eisenstadt* v. *Baird*, 405 U.S. 438; 92 S. Ct. 1029; 31 L. Ed. 2d 349 (1972). *Griswold* v. *Connecticut*, 381 U.S. 479; 85 S. Ct. 1678; 14 L. Ed. 2d 510 (1965). Those decisions concern the safeguarding of certain intimate relationships usually relating to the family or, as in *Stanley* v. *Georgia*, 394 U.S. 557; 89 S. Ct. 1243; 22 L. Ed. 2d 542 (1969), protecting the home from unwarranted governmental intrusions. The petitioners in this case cannot bring themselves within the protection afforded by those cases.

II. The Petitioners Were Not Engaged in Purely Off-Duty Private Conduct.

The conduct of the petitioners was not purely private and off-duty. The petitioners wore their uniforms in the parade and when they left the Inn. The Supreme Judicial Court, in its decision, stated:

> "[T]he police officers were invited to Rhode Island for the purpose of representing the Boston Police Department; they were to march in the parade in the uniform of the Boston police. Arrangements for

a bus to Rhode Island and payment therefore were made by the Boston Police Patrolmen's Association. Arrangements for the police officers while in Rhode Island were made by the Newport police association, and the latter association paid for the accommodations at the inn. Apparently the reservations at the inn were made for the police officers as a group. On their arrival the officers did not register by individual name; rather one officer signed for the two or three officers occupying each room. Thus the rooms at the inn were in a sense registered to the officers as a group of Boston police officers and not as individual persons. The officers had requested that they be allowed to use four Boston police department motorcycles in the parade; the plaintiff Broderick spoke with the commissioner who granted permission to use the motorcycles subject to the posting of a bond. Further, and of some importance, the police officers while marching in the parade not only wore the uniform of the Boston police department, but displayed and marched under the Boston police department flag, the city of Boston flag, the Commonwealth of Massachusetts flag, and the banner of the Boston Police Patrolmen's Association." Petition for a Writ of Certiorari, pp. 24-25.

Therefore, even if there is a right to refuse to answer questions concerning off-duty conduct, the petitioners could not come under such a right. The Supreme Judicial Court stated that because the petitioners' activity was "undertaken under a cloak of officialdom, we are not drawn into questions relating to purely private conduct." Petition, *supra*, p. 24.

III. The Decision Below Rests on Independent State Grounds because the Police Commissioner Has Broad Powers Pursuant to Massachusetts St. 1962, c. 322, to Control and Administer His Department.

The Massachusetts legislature has given broad power to the Police commissioner, to affect both on and off-duty activities of police officers.

Massachusetts St. 1962, c. 322, states that:

> "The Police commissioner shall have cognizance and control of the government, administration, disposition and discipline of the department, and of the police force of the department and shall make all needful rules and regulations for the efficiency of said police . . . whether *on* or *off* duty, be subject to the rules and regulations made under this section" (emphasis added).

This is due to the fact that the police department is a highly sensitive and disciplined organization, and must be such in order to *function effectively. Seattle Police Officers' Guild* v. *City of Seattle,* 80 Wash. 2d 307; 494 P. 2d 485 (1972). *Davenport* v. *Board of Fire and Police Commissioners of Peoria,* 2 Ill. App. 3d 864; 278 N.E. 2d 212, 216 (1972).

Conclusion.

For these reasons, a writ of certiorari should not issue.

Respectfully submitted,

PETER KOFF,
Assistant Corporation Counsel,
City of Boston Law Department,
City Hall,
Boston, Massachusetts 02201.
(617) 722-4100

LAWRENCE J. BALL,
3 Center Plaza, Room 630,
Boston, Massachusetts 02108.
(617) 742-1183

On the brief:
PAUL WOOTEN,
Legal Intern.